IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
July 17, 2006 Session

JEAN FRAZER v. HORTON AUTOMATICS, A DIVISION OF OVERHEAD DOOR CORPORATION, ET AL.

Appeal from the Circuit Court for Hamilton County
No. 03 C 1131 Samuel H. Payne, Judge

No. E2006-00102-COA-R9-CV - FILED OCTOBER 23, 2006

Jean Frazer ("Plaintiff") sued Horton Automatics, a Division of Overhead Door Corporation; Carolina Door Controls, Inc.; and Chattanooga Bone & Joint Surgeons, P.C. ("Chattanooga Bone & Joint") regarding injuries Plaintiff received while attempting to enter Chattanooga Bone & Joint's facility through an automatic sliding door. Chattanooga Bone & Joint filed a motion for summary judgment, which the Trial Court granted finding and holding that Chattanooga Bone & Joint "had no duty relative to the automatic doors." The case is before us on interlocutory appeal. We vacate the grant of summary judgment to Chattanooga Bone & Joint and remand.

Interlocutory Appeal Pursuant to Rule 9, Tenn. R. App. P.;
Judgment of the Circuit Court Vacated; Case Remanded

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and CHARLES D. SUSANO, JR., J., joined.

Richard L. Duncan and Cary L. Bauer, Knoxville, Tennessee for the Appellant, Jean Frazer.

W. Mitchell Cramer and Carrie S. O'Rear, Knoxville, Tennessee for the Appellee, Chattanooga Bone & Joint Surgeons, P.C.

OPINION

Background

Plaintiff sued the Defendants claiming, in part, that when she attempted to enter Chattanooga Bone & Joint's facility for an appointment on February 24, 2003, the exterior automatic doors unexpectedly closed causing Plaintiff to fall and sustain serious injuries. Plaintiff, who was 68 years old at the time, was a post-surgery patient of Chattanooga Bone & Joint and was utilizing a walker to ambulate. Plaintiff's son drove her to Chattanooga Bone & Joint for her appointment and helped Plaintiff out of the car in front of the entrance doors. Plaintiff's son then left to park the car and Plaintiff attempted to enter the Chattanooga Bone & Joint facility through the automatic doors. Plaintiff described the accident stating: "The doors opened, and I walked through, and they closed and knocked me over." She further stated: "As far as I know, when it closed it hit the walker, and it was unbalanced - - like the walker - - I don't know what happened to the walker. It was just like there was no balance there." Plaintiff fell backward and hit her head, back, and left leg on the concrete.

Chattanooga Bone & Joint filed a motion for summary judgment asserting, in part, that it did not choose the automatic doors that were installed at its facility and that it did not manufacture, install, maintain, repair, or set the controls for those automatic doors.[1] Chattanooga Bone & Joint further asserted that it did not have actual or constructive knowledge that the automatic doors at issue were not functioning properly or that those doors posed an unreasonable risk of harm. Chattanooga Bone & Joint supported its motion for summary judgment, in part, by filing the affidavit of Vanessa Knight, Chattanooga Bone & Joint's Business Manager. Ms. Knight swore in her affidavit that when the building was constructed for Chattanooga Bone & Joint in 1999, Chattanooga Bone & Joint informed the architect and contractor of its desire for automatic doors suitable for its orthopedic patients. Ms. Knight's affidavit further asserted that Carolina Door Controls installed and provided all maintenance and inspections of the automatic doors at issue, that Chattanooga Bone & Joint never modified or altered the doors, and that there have been no incidents or injuries associated with these doors other than the incident resulting in this lawsuit. Chattanooga Bone & Joint also filed the affidavits of three other employees, Al Solano, a Cast Tech; Ta-Tanisha Pope, a Medical Assistant; and Julie Ward, R.N. Each of these employees' affidavits is substantially the same and each asserts, in part, that no patient or visitor to Chattanooga Bone & Joint ever complained about the doors, and that the affiant has walked through the doors on many occasions and has observed patients walking through the doors on many occasions and never has observed the doors closing too quickly or malfunctioning.

Joel D. Martin, Plaintiff's expert, testified via deposition. When asked his understanding of how Plaintiff fell, Mr. Martin testified:

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[1] This interlocutory appeal involves only the Trial Court's grant of summary judgment to Chattanooga Bone & Joint. As such, we will not discuss issues pertaining to any other defendant.

> As [Plaintiff] approached the door, she was moving sufficiently fast that the motion detectors did sense her approach and opened the doors. As she passed through the motion-sensing area, she entered what is referred to as the dead band or the zone where the motion detectors are not designed to see her. In this case, that area was out of specification. Where we are really looking for five inches or less from the door, I measured - - when I was at the clinic, I measured a 15-inch dead band at the entry site of the door.
>
> She entered this dead zone, at which time, as soon as the motion detectors lost her, because she entered this dead zone, it began a time-out where the doors would, after this preset time-out, the doors would initiate a closing operation, unless the photocell beams were intercepted by an object in the threshold. Unfortunately, her walker was configured in such a way that the beams passed through it. And so the - - once the walker is in the threshold area, the beams would pass through it and would not be obstructed, so the door time-out would continue to time-out.

Mr. Martin tested the automatic doors at issue and testified regarding this testing stating: "I would venture to say no one knows the exact speed that [Plaintiff] was moving the walker. But we were able to repeatedly cause the system to miss the walker without moving it at an inordinately fast speed [when we did the testing.]"

Mr. Martin opined that the door-closing delay on the automatic doors at the time of Plaintiff's accident was set at 1.3 seconds. Mr. Martin testified that the length of the delay can be adjusted and that ANSI, which is a group of automatic door manufacturers, recommends a four second delay time. Mr. Martin testified: "In an orthopedic clinic setting like this, I think it was unwise to cut the recommended setting in half from three seconds down to less than 1.5 and that this needed to be either not done or pointed out to the owners that the doors are closing quite quickly for this environment."

Mr. Martin testified that not only was the door-closing delay on the automatic doors set too short, but the closing speed of the doors also was set too fast. Mr. Martin testified:

> If [Plaintiff] had approached these doors and it had a four-second delay before time-out, it's probable she would have been through that threshold. Four seconds is much longer than she had.
>
> Secondly, even if for whatever reason, pain in the leg, she stopped in that doorway, which she could have done, now, if those doors had begun to close at twice - - at half the speed that they were set at, instead of 1.8 to two seconds before hitting the walker, she would have had four seconds before they hit the walker. With four seconds, the door motion would have been much slower and she may not have panicked, been startled, and fallen backwards. So if we simply use the industry recommended time-out of three to four seconds, and if we had slowed the doors

> down to an appropriate speed for these people, there's a good chance we could have avoided this accident and even with the inherent problems with the sensors.

Mr. Martin opined that Chattanooga Bone & Joint was "in, by far, the best position to observe this dangerous situation." Mr. Martin further testified:

> with regard to the clinic, I'm not suggesting that they should have checked it every day. They should have been aware as they go in and out of the door, which I am sure they did, that this is closing pretty fast. There's not much of a delay on this. This could injure our clientele. It's one thing to request a safe door. It's another thing to ignore an unsafe door. So my criticism of the clinic is that it shouldn't have been that difficult to recognize an unsafe situation as existing.…[The door closed too quickly.] For that clientele. It's closing at the maximum allowable speed that doors are supposed to close at. It's a no-brainer to say that the speed you would use - - the maximum speed allowable cannot be appropriate for people who are possibly barely moving through that door on a walker or crutches. It just does not seem prudent to me to allow doors to close at their maximum allowable speed in this situation.

Mr. Martin's report, which was attached to his deposition as an exhibit, stated:

> The closing rate of the doors has been set at, or near, the maximum allowable. When determining what closing speed would be appropriate for this installation, it would be mandatory to consider the age, condition, and ambulatory nature of the clinic patients that would make up the majority of the pedestrians using these doors. To help avoid accidents, you must consider a worst case scenario which would be an elderly patient with an existing injury, using some form of assisted walking device and approaching the doors unassisted by any other person. In this case a speed well below the maximum allowable would be necessary for safety. Certainly, the door speed used at a gymnasium or ski resort would not be suitable for a bone and joint center. In this installation, it was improper to have used the full closing speed allowable for these doors, and this error certainly contributed to the accident and injury [Plaintiff] sustained when her walker was struck by the doors operating at full speed. If the speed had been reduced by 50%, [Plaintiff] would have had up to 4 seconds to realize the doors had begun closing on her, and may have been able to avoid being injured.

Warren F. Davis, Ph.D., also testified by deposition as an expert for Plaintiff. Dr. Davis testified regarding his criticisms of Chattanooga Bone & Joint stating:

> With regard to the Chattanooga clinic, bone and joint surgeon's clinic, the primary opinion is failure to do the daily safety check as required by all of the manufacturers and recommended by the American Association of Automatic Door Manufacturers,

> failure to post adequate warnings on the door, failure to provide a door that was safe for all anticipated users of the door.

Dr. Davis explained that "[a] daily safety check is a series of steps or tests that the door owner is supposed to do each and every day in order to ensure the safe operation of the door. The door manufacturers, including Horton, [who manufactured the automatic doors at issue in this case] insist that the door owner must do this for safety." Dr. Davis opined:

> if the daily safety check is done each and every day that there is - - in the normal variation of things, there will come a time where the door will close on the person who is doing the daily safety check.…And when it happens, if you follow the instructions in the manual, you are supposed to call for service and find out what's wrong with your door. That could have occasioned, or that would have occasioned, the upgrading of the door to be safer as far as presence detection is concerned.

Dr. Davis tested the automatic doors at issue and testified regarding his findings. Dr. Davis explained that the automatic doors are equipped with "a thing called a hold-open time delay that's appended to the end of the motion-detection signal, [that] keeps the door open for a little bit more time. It's intended to allow the user time to get through the door before it begins to close." Dr. Davis testified that the beams are set such that "[t]hey go above or below the walker." Dr. Davis explained: "If the walker had gone only as far as getting … into a position where it occluded either one of the hold-open beams, then the door would have reopened or stayed open." Dr. Davis opined that a portion of Plaintiff's walker was beyond the plane of the door and its hold-open beams "[b]ecause if it had stopped in the plane of the hold-open beams, it would have occluded one of the beams [causing the door to remain open]. If it stopped before that, the door would have closed past it and there wouldn't have been an accident."

Dr. Davis also testified about his findings regarding the detection pattern of the exterior side microwave motion sensor on the automatic doors. Dr. Davis testified that this detection pattern:

> which is approximately elliptical when projected to the floor, is supposed to come to within five inches of the face of the door at the, what I call, the proximal edge, the closest point on that ellipse. And, in fact, I found that there was a good 18 inches or so from the door on the exterior side where there was virtually no motion detection capability.

Dr. Davis further testified: "When I inspected the door, not only was the closing time okay, but it had the latch check and everything was fine and the closing force was fine."

John Cringole, a Product Manager for Horton Automatics, the manufacturer of the automatic doors at issue in this case, testified by deposition. Mr. Cringole inspected the automatic doors on October 31, 2003, and noted that the AAADM daily maintenance checklist sticker was not

present on the doors. Mr. Cringole testified that Horton Automatics relies upon the distributor, in this case Carolina Door Controls, to put the sticker on and recommends that the sticker be placed "either adjacent the on/off switch or at a location that is readily visible to the owner on a daily basis."

Jerry Tyler, a service technician with Carolina Door Controls, testified during his deposition that Horton Automatics typically provides warning stickers with their door packages that warn users of the automatic door and caution them to keep moving. These stickers are applied to the doors themselves. Mr. Tyler testified: "As far as I remember, those stickers [on the automatic doors at issue] were there." Mr. Tyler further testified that the last time he was at the Chattanooga Bone & Joint facility, which was the day after Plaintiff's accident, he noted that "the ones that say automatic door were gone - - … - -and they put something else on there like Chattanooga Automatic (sic) Bone & Joint - - … - - spray painted or something." Mr. Tyler testified that he "[a]bsolutely" recalls the automatic door/keep moving warning stickers being on the automatic doors at issue prior to that particular visit.

By order entered October 12, 2005, the Trial Court granted Chattanooga Bone & Joint's motion for summary judgment finding and holding that Chattanooga Bone & Joint "had no duty relative to the automatic doors." The Trial Court entered an order granting Plaintiff's request for an interlocutory appeal regarding the grant of summary judgment to Chattanooga Bone & Joint, and we granted the interlocutory appeal.

Discussion

Both parties agree there is only one issue on appeal: whether the Trial Court erred in granting summary judgment to Chattanooga Bone & Joint.

In *Blair v. West Town Mall,* our Supreme Court reiterated the standards applicable when appellate courts are reviewing a motion for summary judgment. *Blair v. West Town Mall,* 130 S.W.3d 761 (Tenn. 2004). In *Blair*, the Court stated:

> The standards governing an appellate court's review of a motion for summary judgment are well settled. Since our inquiry involves purely a question of law, no presumption of correctness attaches to the lower court's judgment, and our task is confined to reviewing the record to determine whether the requirements of Tennessee Rule of Civil Procedure 56 have been met. *See Staples v. CBL & Assoc., Inc.*, 15 S.W.3d 83, 88 (Tenn. 2000); *Hunter v. Brown*, 955 S.W.2d 49, 50-51 (Tenn. 1997); *Cowden v. Sovran Bank/Central South*, 816 S.W.2d 741, 744 (Tenn. 1991). Tennessee Rule of Civil Procedure 56.04 provides that summary judgment is appropriate where: 1) there is no genuine issue with regard to the material facts relevant to the claim or defense contained in the motion, and 2) the moving party is entitled to a judgment as a matter of law on the undisputed facts. *Staples*, 15 S.W.3d at 88.

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> When the party seeking summary judgment makes a properly supported motion, the burden shifts to the nonmoving party to set forth specific facts establishing the existence of disputed, material facts which must be resolved by the trier of fact.
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> To properly support its motion, the moving party must either affirmatively negate an essential element of the non-moving party's claim or conclusively establish an affirmative defense. If the moving party fails to negate a claimed basis for the suit, the non-moving party's burden to produce evidence establishing the existence of a genuine issue for trial is not triggered and the motion for summary judgment must fail. If the moving party successfully negates a claimed basis for the action, the non-moving party may not simply rest upon the pleadings, but must offer proof to establish the existence of the essential elements of the claim.

Blair, 130 S.W.3d at 763, 767 (quoting *Staples*, 15 S.W. 3d at 88-89) (citations omitted)).

Our Supreme Court has also provided instruction regarding assessing the evidence when dealing with a motion for summary judgment stating:

> The standards governing the assessment of evidence in the summary judgment context are also well established. Courts must view the evidence in the light most favorable to the nonmoving party and must also draw all reasonable inferences in the nonmoving party's favor. *See Robinson v. Omer*, 952 S.W.2d at 426; *Byrd v. Hall*, 847 S.W.2d at 210-11. Courts should grant a summary judgment only when both the facts and the inferences to be drawn from the facts permit a reasonable person to reach only one conclusion. *See McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn. 1995); *Carvell v. Bottoms*, 900 S.W.2d 23, 26 (Tenn. 1995).

Staples v. CBL & Assocs., Inc., 15 S.W.3d 83, 89 (Tenn. 2000).

In the case now before us, the Trial Court found and held that Chattanooga Bone & Joint "had no duty relative to the automatic doors." "In a premises liability case, an owner or occupier of premises has a duty to exercise reasonable care with regard to social guests or business invitees on the premises." *Rice v. Sabir*, 979 S.W.2d 305, 308 (Tenn. 1998) (footnote omitted). Our Supreme Court has explained:

> Business proprietors are not insurers of their patrons' safety. However, they are required to use due care under all the circumstances. *Martin v. Washmaster Auto Ctr. U.S.A.*, 946 S.W.2d 314, 318 (Tenn. Ct. App. 1996). "Liability in premises liability cases stems from superior knowledge of the condition of the premises."

> *McCormick v. Waters*, 594 S.W.2d 385, 387 (Tenn. 1980). In order for an owner or operator of premises to be held liable for negligence in allowing a dangerous or defective condition to exist on its premises, the plaintiff must prove, in addition to the elements of negligence, that: 1) the condition was caused or created by the owner, operator, or his agent, or 2) if the condition was created by someone other than the owner, operator, or his agent, that the owner or operator had actual or constructive notice that the condition existed prior to the accident. *Martin v. Washmaster Auto Center, U.S.A.*, 946 S.W.2d 314, 318 (Tenn. Ct. App. 1996) (citing *Ogle v. Winn-Dixie Greenville, Inc.*, 919 S.W.2d 45, 47 (Tenn. App. 1995); *Jones v. Zayre, Inc.*, 600 S.W.2d 730, 732 (Tenn. App. 1980)). We have previously held that constructive notice can be established by proof that the dangerous or defective condition existed for such a length of time that the defendant, in the exercise of reasonable care, should have become aware of the condition. *Simmons v. Sears, Roebuck & Co.*, 713 S.W.2d 640, 641 (Tenn. 1986).

Blair, 130 S.W.3d at 764.

The record reveals that Chattanooga Bone & Joint had the building built especially for it. Although Chattanooga Bone & Joint argues that it did not create the "condition" of the automatic doors because it hired an architect and a contractor and relied upon those parties to appropriately construct its building, we find this argument to be without merit. It is rare in today's society that a business owner will completely construct its own facility without hiring professionals such as architects and contractors. Chattanooga Bone & Joint cannot eliminate its "duty to exercise reasonable care with regard to social guests or business invitees on the premises" simply by hiring other parties to build the building. *Rice*, 979 S.W.2d at 308 (footnote omitted). In such a situation, the condition at issue "was caused or created by the owner, operator, or his agent." *Blair*, 130 S.W.3d at 764. While the fact that Chattanooga Bone & Joint hired and relied on experts in the construction of its building, including the automatic doors in question, may well be relevant as to whether Chattanooga Bone & Joint met its duty to exercise reasonable care to its patients, such a fact does not allow Chattanooga Bone & Joint to eliminate its duty as the "owner or occupier of [the] premises." *Rice*, 979 S.W.2d at 308.

Viewing the evidence in the light most favorable to Plaintiff, the nonmoving party, and drawing all reasonable inferences in Plaintiff's favor, as we must, we find that there is evidence that the automatic doors at issue had a door closing delay time shorter than and a closing speed faster than the industry recommended times. Further, the evidence shows that the dead-band zone, or zone where the motion detectors lose sight of a person, was larger than it should have been. The evidence also reveals that the warning stickers that were supposed to be on the automatic doors were not on the doors the day after Plaintiff's accident and that the daily safety checklist sticker also was not in place several months after the accident. Plaintiff's expert Joel Martin testified that Chattanooga Bone & Joint "should have been aware as they go in and out of the door, which I am sure they did, that this is closing pretty fast. There's not much of a delay on this. This could injure our clientele." Plaintiff's expert, Dr. Warren Davis opined that had Chattanooga Bone & Joint done a daily safety

check of the automatic doors as it should have, this would have led to the "upgrading of the door to be safer as far as presence detection is concerned." While the affidavits submitted by Chattanooga Bone & Joint run counter to Plaintiff's proof, that is what gives rise to the existence at this summary judgment stage of genuine issues of material fact.

We hold that Chattanooga Bone & Joint, as the "owner or occupier of [the] premises," did have a duty relative to the automatic doors at issue in this case. *Rice*, 979 S.W.2d at 308. As such, the grant of summary judgment on the basis that Chattanooga Bone & Joint had no duty was improper. Further, genuine issues of material fact exist as to whether Chattanooga Bone & Joint breached its duty and as to whether the automatic doors at issue were dangerous or defective. Given this, we vacate the grant of summary judgment to Chattanooga Bone & Joint.

Conclusion

The judgment of the Trial Court is vacated, and this cause is remanded to the Trial Court for further proceedings consistent with this Opinion and for collection of the costs below. The costs on appeal are assessed against the Appellee, Chattanooga Bone & Joint Surgeons, P.C.

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D. MICHAEL SWINEY, JUDGE